

Expedited procedure—authorisation to make objection

Yarran/Hamill Resources Ltd/Western Australia [2003] NNTTA 99

Deputy President Sumner, 11 September 2003

Issue

This is a decision in a preliminary inquiry by the National Native Title Tribunal to determine whether expedited procedure objection applications lodged on behalf of the Ballardong People were properly authorised. This is the first time this question has arisen in right to negotiate proceedings before the Tribunal.

Background

The relevant objections were lodged by Robin Yarran on behalf of the Ballardong People. A challenge to his authority to lodge objections on behalf of the Ballardong People was made by the South West Aboriginal Land and Sea Council (SWALSC). Mr Yarran is one of the 14 people who jointly comprise the applicant on the Ballardong People's claimant application for determination of native title, which was registered by the Tribunal on 10 July 1997. The earliest of the relevant objection matters was lodged with the Tribunal on 5 July 2001.

On 15 April 2002, SWALSC filed a notice of motion in the Federal Court which, among other things, sought to remove Mr Yarran as one of these named as the applicant on the Ballardong application and to replace him with a group that included Justin Kicket. Justice French dismissed the application due to insufficient evidence in support, particularly in relation to proof of questions of withdrawal of authorisation, excess of authority and authorisation of the proposed replacement applicant required in terms of s. 251B of the *Native Title Act* 1993 (Cwlth) (NTA). SWALSC conceded that the evidence before the court was insufficient to justify the orders sought.

On 4 March 2003, a member of the Tribunal was appointed to preside over a conference convened pursuant to s. 150 of the NTA to try to resolve any matter that was relevant to the inquiry into the expedited procedure objection applications. On 18 June 2003, the presiding member terminated the mediation because it was apparent that it was not going to achieve resolution of the issues between the parties.

At the preliminary inquiry, Mr Yarran contended that, at a Ballardong meeting some years ago, he had volunteered to carry out the function of lodging objections and had carried out this function ever since. He also contended that, both as one of those named as the applicant and Ballardong elder, he was entitled to perform this function.

SWALSC admitted that, at some point, Mr Yarran did have authority to lodge objections but submitted that this authority was subsequently withdrawn. Evidence to support this submission included evidence pertaining to:

- a Ballardong working party meeting of 17 October 2001, where a motion was carried to have the NLC remove Mr Yarran as an applicant;
- a Ballardong community meeting of 15 November 2001, where a resolution was passed for the replacement under s. 66B NTA on the grounds that Mr Yarran was no longer authorised to make the claimant application and deal with matters arising in relation to it and had exceeded his authority in relation to it;
- a Ballardong meeting of 12 March 2002 where SWALSC was instructed to proceed with opposition to all of the objections lodged by Mr Yarran because he did not have a right to represent the Ballardong claim or speak for Ballardong country;
- a Ballardong community meeting on 6 May 2003, which resolved to inform the Tribunal that, while Mr Yarran was a member of the Ballardong community, they did not support him lodging objections on their behalf without proper consultation.

The authorisation of an applicant

Deputy President Sumner held that the failure of a s. 66B application to replace the applicant was not necessarily determinative of the issue. In this matter, the Tribunal had to consider whether or not there was sufficient evidence to support a finding that Mr Yarran was not authorised to bring objections on behalf of the group, not whether there was evidence to support a s. 66B application.

The Tribunal held both that the purpose of the NTA and its workability would be severely compromised if each person named as one of those constituting the applicant and, therefore, the registered native title claimant (see s. 253), could lodge objections and then seek to negotiate separate agreements in relation to them. The Tribunal's approach to making consent determinations in circumstances where one of the people in the group named as the registered claimant (see s. 253) refused to sign a s. 31 agreement against the wishes of others so named and the native title claim group would no longer be possible—at [36].

The applicability of s. 251B of the NTA

The Tribunal considered that matters arising in relation to a claimant application included matters involving right to negotiate applications—see ss. 62A and 75.

Consequently, the authorisation requirements in s. 251B govern the procedures adopted by the claimant group to determine who has authority to act in relation to right to negotiate inquiries. In addition, the Tribunal held that, even if s. 251B did not apply to right to negotiate matters (because they do not strictly relate to the claimant application) it was nevertheless appropriate to apply the principles of that provision. As a matter of commonsense, in a situation where there are traditional laws and customs of a group governing its decision making, they should be applied—at [37].

Decision

It was held that the evidence produced by Mr Yarran amounted to little more than an assertion of an authority to lodge objections solely because he is a traditional owner and elder of one family group that constitutes part of the Ballardong claimant group. There was no evidence of the existence of Aboriginal traditional law and custom or the manner of its operation in making decisions on whether expedited procedure objections can be lodged on behalf of the Ballardong native title claim group—at [39].

The Tribunal was satisfied that:

- there existed a Ballardong working party established by the claimant group to manage the native title claims and any related future acts;
- Mr Yarran was not now authorised by the Ballardong claim group to lodge objections to the expedited procedure and that any previous authorisation he had to lodge and deal with objections had been withdrawn—at [55].

Therefore, the objections lodged by Mr Yarran were dismissed under s. 148(a) of the NTA. Further, the Tribunal indicated that it is likely that it would dismiss any future objections lodged by Mr Yarran, unless they were accompanied by satisfactory evidence that he was properly authorised by the Ballardong claim group to make the objections—at [47] and [58].